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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JUSTIN FONG, M.D., et al.,

Plaintiffs and Appellants,

v.

PHILIP SHERIDAN,

Defendant and Respondent.

A144286, A145222

(Marin County
Super. Ct. No. CIV 1003444)

Plaintiffs Justin Fong, M.D., and Suzanna Fong bought a seaside property in Tiburon from defendant Philip Sheridan. Before purchasing the property, the Fongs noticed a foul odor in one of the downstairs rooms, which the parties' dual agent attributed to the "sea air." After moving in, the Fongs discovered the odor was due to buried oil and septic tanks.

The Fongs sued Sheridan and the agent for, inter alia, breach of contract and negligent and intentional misrepresentation. They later amended their complaint to add a claim for rescission. Prior to trial, the Fongs reached a good faith settlement with the agent for \$275,000. In a statement of decision, the trial court found for Sheridan on the breach of contract and intentional misrepresentation claims, but held Sheridan was vicariously liable for negligent misrepresentation by the agent. The trial court also found the Fongs had proved \$91,635 in damages. The Fongs were awarded nothing in the judgment because their damages were less than the good faith settlement with the agent. Sheridan was deemed the prevailing party and was awarded attorney fees and costs.

The Fongs now appeal, arguing (1) the trial court's damage award was too low, (2) the trial court erred in finding for Sheridan on the breach of contract claim, (3) they should have been allowed to rescind the sales contract, and (4) they are the prevailing parties and thus are entitled to attorney fees and costs. We conclude remand is necessary to clarify ambiguities in the trial court's statement of decision concerning damages. We also vacate the prevailing party determination and attorney fee and cost awards. The judgment is affirmed in all other respects.

I. BACKGROUND

In 1974, Sheridan purchased the subject property, which is located on Paradise Drive in Tiburon. He lived there for about 18 years, and then leased it. In or around 2007, Sheridan listed property for sale through Bradley Real Estate, Inc. (Bradley) and one of its agents, Jim Armstrong.

In October 2007, Armstrong showed the property to the Fongs, who did not have a real estate agent at the time. In one of the downstairs rooms, the Fongs noticed a "musky smell." Armstrong stated the smell was due to the "sea air," and could be remedied by "changing things like sheetrock." The Fongs ultimately agreed to purchase the property. Armstrong acted as the real estate agent for both the Fongs and Sheridan in the sales transaction.

The Fongs moved into the property in June or July 2008. Around that time, Mrs. Fong noticed an "oil-like" odor on the lower level of the house. The Fongs continued to notice unpleasant odors for the following two years. In 2010, the Fongs hired a contractor who found a buried septic tank on the property. Further investigation also revealed a buried oil tank. In April 2010, the Fongs sent a letter to Bradley describing what they had found. Their attorney also wrote to Sheridan about the possibility of mediation.

In July 2010, the Fongs filed the instant action against Sheridan, Bradley, and Armstrong. Their complaint asserted claims for breach of contract, fraud, negligent misrepresentation, and breach of fiduciary duty. Among other things, the Fongs sought compensatory and punitive damages. They did not seek rescission of the sales contract.

In 2011, the Fongs hired Linscott Engineering Contractors to deal with the oil tank. One of Linscott's employees cut a pipe connected to the oil tank, causing oil to flow into the soil. Dr. Fong testified the pipe was cut without his permission, while the Linscott employee claimed Dr. Fong had directed him to cut and cap the tank's pipes. According to Dr. Fong, the Fongs needed to wait three weeks to address the spill because of rain.

In February or March 2011, after contaminated soil was removed from the property, the Fongs noticed a "residual smell." Concerned about their family's health and safety, the Fongs moved out of the house and leased a home in Millbrae. The family moved back into the subject property in November 2011, after the odor began to dissipate.

The oil tank was removed in or around July 2012. Soon thereafter the Fongs noticed an "overwhelming" chemical smell, and they again vacated the property. The night they left, Mrs. Fong fell ill and was taken to the emergency room. A contractor later informed the Fongs remediation would require tearing down the house on the property.

In March 2013, the Fongs moved for leave to amend their complaint. The trial court granted the motion, and the Fongs amended their pleading to, among other things, add a claim for rescission.

The Fongs settled with Armstrong and Bradley for \$275,000, and the trial court granted a motion to determine good faith settlement on February 5, 2014.

A court trial was held on the Fongs' claims against Sheridan in May and June 2014. On August 26, 2014, the trial court issued a proposed statement of decision. The Fongs objected to the proposed statement. The trial court issued a final statement of decision on December 10, 2014. The court held the Fongs had failed carry their burden on their claims for breach of contract and fraud. The court found for the Fongs on their claim for negligent misrepresentation based on the theory Sheridan could be held vicariously liable for Armstrong's October 2007 statement that the musty odor on the

property was due to the “sea air.” The court also found the Fongs were entitled to \$91,635 in damages for discovery and remediation of the tanks.

After deducting the \$275,000 the Fongs had received in settlement, the trial court entered a net judgment for the Fongs in the amount of zero. The trial court subsequently ruled in favor of Sheridan as the prevailing party and filed an amended judgment awarding Sheridan \$456,032.50 in attorney fees and \$21,057.35 in costs. The Fongs timely appealed from both the original and amended judgments.

II. DISCUSSION

A. Damages

The Fongs argue the trial court applied the wrong legal standard in assessing the damages to which they were entitled for their negligent misrepresentation claim. Regardless of the correct measure of damages, the Fongs also contend the trial court erred in finding damages of only \$91,635. We conclude the trial court applied the correct measure of damages, but that remand is necessary to clarify ambiguities in its statement of decision.

1. Measure of Damages

The trial court found the measure of the Fongs’ damages was the actual or out-of-pocket losses suffered because of the negligent misrepresentation. The Fongs argue this measure of damages is too restrictive. The Fongs’ contention raises a question of law, which we review de novo. (See *Estate of Beckel* (2009) 174 Cal.App.4th 34, 37.) We conclude the trial court applied the correct measure of damages.

Civil Code¹ section 3343 limits the damages for fraud in the purchase, sale, or exchange of property to out-of-pocket expenses. (§ 3343, subds. (a), (b)(1); *Alliance Mortgage Co. v Rothwell* (1995) 10 Cal.4th 1226, 1240–1241 (*Alliance*).) “This section does not apply, however, when a victim is defrauded by its fiduciaries. In this situation, the ‘broader’ measure of damages provided by sections 1709 and 3333 applies.” (*Alliance*, at p. 1241, fns. omitted.) Section 3333 allows a plaintiff to recover “the

¹ All statutory references are to the Civil Code unless otherwise specified.

amount which will compensate for the detriment proximately caused” by a breach of a noncontractual obligation. Our Supreme Court has indicated there is a distinction between cases involving negligent misrepresentation and intentional misrepresentation by a fiduciary. “[A] plaintiff is only entitled to its actual or ‘out-of-pocket’ losses suffered because of [a] fiduciary’s negligent misrepresentation under section 3333.” (*Alliance*, at pp. 1249–1250, citing *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 502, 504.)

In the instant action, the Fongs attempted to hold Sheridan vicariously liable for the misrepresentations of Armstrong, who acted as the Fongs’ fiduciary and Sheridan’s agent. The trial court rejected the Fongs’ claim for intentional misrepresentation, finding Armstrong lacked actual knowledge of the alleged defects and the Fongs had failed to prove scienter. However, the trial court found for the Fongs on their claim for negligent misrepresentation based on Armstrong’s representation that the musty odor on the property was due to “sea air.” Because the Fongs prevailed on their claim for negligent misrepresentation—but not their claim for intentional misrepresentation—the proper measure of damages is the Fongs’ actual or out-of-pocket losses. (*Alliance, supra*, 10 Cal.4th at pp. 1249–1250.)

The authority cited by the Fongs does not hold otherwise. In *Strebel v. Brenlaw Investments, Inc.* (2006) 135 Cal.App.4th 740 (*Strebel*), the defendant real estate agent concealed information about tax liens on and the salability of a Sonoma property the plaintiff had agreed to purchase. (*Id.* at p. 743.) In reliance on the defendant’s representations, the plaintiff sold his San Bruno home and prepared to move. (*Ibid.*) The sale of the Sonoma property fell through due to the liens, and the plaintiff was unable to find a suitable replacement property. The plaintiff then prevailed in a suit for unfair business practices, fraud, negligence, and breach of fiduciary duty. (*Id.* at p. 744.) The defendant appealed, arguing the trial court erroneously permitted the jury to include in the damage award the lost appreciation in the value of the San Bruno home and the lost use of the San Bruno property. (*Id.* at p. 742.)

Our colleagues in Division Three found the trial court used the correct measure of damages. (*Strebel, supra*, 135 Cal.App.4th at p. 742.) The court reasoned there was no fixed rule for the measure of tort damages recoverable under section 3333, and the purpose of tort damages were to fully compensate the victim for all the injury suffered. (*Id.* at p. 749.) The court concluded the defendant's fraud caused the plaintiff to sell his San Bruno house sooner than he would otherwise have done, rendering him unable to purchase a replacement home before housing values substantially increased. (*Ibid.*) Unlike in the instant action, the plaintiff in *Strebel* prevailed on a claim for intentional misrepresentation. (*Id.* at p. 744.) Moreover, the court in *Strebel* found the plaintiff's claim was unique since, unlike here, the damages from the fraud did not relate to misrepresentations about the value of the property being sold or exchanged, but to the amount the San Bruno property appreciated after the plaintiff sold it. (*Id.* at pp. 748–749.)

2. Damage Award

In its proposed statement of decision, the trial court concluded: “The plaintiffs have attempted to prove that their damages include virtually every cent that they expended at the property. This is so over-reaching that it makes assessing the damages virtually an exercise in speculation. Plaintiffs’ claims of medical damages were not supported by the evidence. However, the court believes that there is sufficient evidence regarding a total of \$91,635.00 for discovery and remediation of the tanks.”

The Fongs objected, arguing the trial court's statement regarding “over-reaching” was ambiguous, and they were entitled to seek damages for all the losses they sustained. The Fongs also argued they were entitled to recover over \$1.9 million: \$1.7 million for soil remediation; \$78,016 for “discovery of tanks and related construction costs”; \$11,790 for tank removal; \$19,459 for construction materials; \$2,755 for moving expenses; \$14,143 for household items lost; \$4,000 for clothing loss; and \$107,904 for loss of use of property. Even if they did not submit enough evidence to support all of their damages, at a minimum, the Fongs argued they provided enough evidence to support an award of \$755,226, which is 40 percent of their damage estimate.

It appears from the record the trial court did not expressly rule on these objections, and its discussion of damages in its final statement of decision is identical to the discussion in its proposed statement of decision.

The Fongs now argue the trial court erred in failing to include in the damage award all damages proximately caused by Armstrong's misrepresentation.² The Fongs contend the trial court was required to review their damage claims and make a finding regarding whether each item was recoverable, and that it is not apparent from the statement of decision whether the trial court did so. The Fongs further argue they presented un rebutted evidence of damages of at least \$287,227.35, related to the discovery, investigation, remediation, and removal of the tanks and contaminated grounds. The Fongs' appellate briefing outlines 22 separate items of damages.³

Upon the request of a party, the trial court "shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial." (Code Civ. Proc., § 632.) Absent a request for a statement of decision, we must presume the judgment is correct and that trial court made every factual finding necessary to support the judgment. (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 61–62.) "The court's statement of decision is sufficient if it fairly discloses the court's determination as to the ultimate facts and material issues in the case." (*Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380.) Failure to make findings on a material issue which would fairly disclose the trial court's determination is reversible error. (*Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 745.) Nevertheless, the error is harmless unless the omitted finding would trump

² Sheridan asserts the Fongs are requesting we make new findings regarding damages, and that such a request is improper under California Rules of Court, rule 8.252(b). He misconstrues the Fongs' briefing. They are not asking for new factual findings. Rather, they are arguing the trial court's statement of decision is inadequate, does not address their timely objections, and is not supported by the evidence.

³ The Fongs also assert the total damages awardable are at least \$308,616.35, due to the damage assessments of Sheridan's experts. It is not entirely clear what they mean by this.

other findings and is supported by substantial evidence in the complaining party's favor. (*Ibid.*)

A party may object to the statement of decision on the ground it omits findings on critical issues controverted at trial or that its findings are ambiguous. (Code Civ. Proc., § 634.) Objections should be specific and pinpoint alleged omissions or ambiguities. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 499.) “[I]f omissions or ambiguities in the statement are timely brought to the trial court’s attention, the appellate court will not imply findings in favor of the prevailing party.” (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; Code Civ. Proc., § 634.)

In this case, the trial court failed to make findings on material issues related to damages. The statement of decision concludes the Fongs are entitled to \$91,635 “for discovery and remediation of the tanks,” but it does not meaningfully explain how that figure was determined. The trial court’s conclusion the Fongs were “over-reaching” is unhelpful, as it does not clarify what particular aspects of the Fongs’ demands were unwarranted. Nor does the statement of decision address the Fongs’ specific objections. Based on this record, we can only speculate as to what was included and excluded from the damage award and why. The trial court’s failure to make requested findings as to separate items of damages was error.⁴ (See *29 Palms Van & Storage v. L.A. Metro. Transit Authority* (1963) 221 Cal.App.2d 183, 185 “[W]here both general and special damages are demanded, it is the duty of the trial court, if it finds for plaintiff, to find separately the general damages and the several categories of special damages.”); *Kuffel v. Seaside Oil Co.* (1977) 69 Cal.App.3d 555, 565–567 [trial court’s failure to make requested findings on gross and net profits, an element of plaintiff’s damages, was error].)

⁴ During oral argument, Sheridan’s counsel referred to several exhibits and the dollar amounts contained therein in an attempt to explain how the trial court calculated the \$91,635 in damages. However, absent a more detailed explanation by the trial court of the damages award calculation in the statement of decision, we cannot rely on counsel’s speculation.

Moreover, we cannot conclude the trial court's error was harmless. In their appellate briefing, the Fongs assert they presented un rebutted evidence showing they paid at least \$287,227 in connection with the damages flowing from the tanks. Sheridan argues he discredited the Fongs' evidence through cross-examination, and that many of the costs claimed by the Fongs are unrelated to the misrepresentations. Sheridan also contends the damages resulting from the oil spill are not recoverable because the Fongs were responsible for cutting the pipe that caused the spill. Sheridan may be correct. But it is unclear whether the trial court considered this issue, and because of the trial court's failure to make the requested findings and ambiguities in the statement of decision, we cannot infer findings in favor of the judgment. We must reverse as long as the Fongs' claims are supported by substantial evidence. (*Sperber v. Robinson, supra*, 26 Cal.App.4th at p. 745.) Having reviewed the record, we conclude at least some of the fees claimed by the Fongs in their appellate briefing are so supported.

For these reasons, we vacate the damage award and remand so the trial court may prepare a sufficient statement of decision on this issue. The statement of decision shall explain the factual basis for the damage award. It shall also address all proper objections previously filed by the Fongs.

B. Breach of Contract

The Fongs contend the trial court erred in finding against them on their claim for breach of contract. According to the Fongs, the purchase agreement required Sheridan to credit the Fongs \$85,000 for "flooring" and "repairs" as well as for other nonrecurring closing costs. The Fongs further contend they received only \$69,250 of the \$85,000 due to them. The argument is meritless. The Fongs did not assert this theory in their operative pleading. The first amended complaint alleges Sheridan breached the contract by failing to disclose all known material facts and defects concerning the property, and it makes no mention of nonrecurring closing costs. Even if this theory was properly raised, the trial exhibit to which the Fongs refer in their appellate briefing indicates they did in fact receive the full \$85,000 credit for nonrecurring closing costs. Likewise, at trial, Dr. Fong conceded the Fongs received \$85,000 in credits for nonrecurring closing costs,

along with a \$10,000 credit for flooring. Mrs. Fong provided similar testimony in her deposition.

C. Rescission

The trial court denied the Fongs' claim for rescission, explaining in the statement of decision: "Plaintiffs were aware of the 'musty odor' since before purchasing the home. Additionally, plaintiffs made substantial renovations to the property that were clearly unrelated to the discovery of the underground tanks. Thus, plaintiffs are unable to restore [the] original property received under the contract to Sheridan. Most importantly, rescission was not added to the Complaint until approximately three years after the filing of the initial complaint. In light of the delay in notice and substantial changes to the property, plaintiffs' claim for rescission is barred." The Fongs now argue the trial court's decision to deny rescission was error. We disagree.

Rescission and damages are alternative remedies. (*Akin v. Certain Underwriters at Lloyd's London* (2006) 140 Cal.App.4th 291, 296.) "The election of one bars the other." (*Ibid.*) A party may rescind if, among other things, his or her consent to the contract was obtained through fraud. (§ 1689, subd. (b)(1).) To effect a rescission a party must: "(a) Give notice of rescission to the party as to whom he rescinds; and [¶] (b) Restore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise" (§ 1691.) Notice of rescission must be provided "promptly upon discovering the facts which entitle [the party] to rescind." (*Ibid.*) However, rescission shall not be denied because of delay in giving notice, "unless such delay has been substantially prejudicial to the other party." (§ 1693.) The decision to grant rescission generally rests upon the sound discretion of the trial court, and will not be set aside absent an abuse of discretion. (See *Wong v. Stoler* (2015) 237 Cal.App.4th 1375, 1388 (*Wong*).)

As an initial matter, we agree with the trial court that the Fongs failed to provide prompt notice of rescission. The Fongs filed the instant action in July 2010. At that time, they had already discovered the foul odor on the property was caused by the buried tanks, not "sea air." Yet, the Fongs did not move to amend their complaint to add a claim for

rescission until April 2013, almost three years later. The Fongs argue they were only put on notice of their right to rescission in March 2013, when they had the property tested for contamination. But pursuant to section 1691, the Fongs were required to provide notice “promptly upon discovering the facts which entitle[d] [them] to rescind.” Thus, the relevant date is the one on which the Fongs were put on notice of the negligent misrepresentation, not the one on which they learned the damages flowing from the negligent misrepresentation were greater than they initially thought.

The trial court’s implicit finding that Sheridan was substantially prejudiced by the delay is also supported by the evidence. By the time the Fongs moved for rescission, they had owned the subject property for over five years. During that time, they had made significant alterations, and it appears some of their efforts to remediate the tanks had made matters worse. For example, a contractor cut a pipe connected to the oil tank, causing a spill on the property which was not addressed for three weeks. It was only after the pipe was cut that the Fongs vacated the property. As Sheridan points out, if the Fongs had rescinded when they first learned of the buried tanks, he could have removed the tanks himself, potentially avoided the oil spill, and remarketed the property. There is also evidence the Fongs attempted to remediate the spill, but it is unclear whether their efforts were successful, especially since they claim hydrocarbons were later found on the property. We must defer to the trial court’s implied findings on this issue.⁵

The Fongs argue rescission is warranted under our recent decision in *Wong, supra*, 237 Cal.App.4th 1375. In that case, the plaintiff purchasers brought an action for rescission against the defendant sellers after discovering their property was connected to

⁵ Significantly, plaintiffs did not raise the issue of substantial prejudice in their objections to the statement of decision. Rather than pinpoint specific ambiguities in the statement of decision, plaintiffs lodged a general objection: “Plaintiffs object to the . . . Court[’s] state[ment] that Plaintiffs are somehow barred from seeking rescission. Neither the law cited by the Court nor the evidence presented at trial supports that conclusion.” This objection is insufficient to bar us from making an implied finding of substantial prejudice. (See *Ermoian v. Desert Hospital, supra*, 152 Cal.App.4th at p. 499 [“overly broad objections and the request to, in effect, start over, do not comply with section 634”].)

a private sewer system rather than a public one. (*Id.* at p. 1379.) The trial court found the defendants acted with reckless disregard in negligently misrepresenting the material facts about the nature of sewer system and the informal association established to maintain it. (*Id.* at p. 1383.) Nevertheless, the trial court denied rescission because the defendants had already purchased a new home and spent a significant sum to improve it, and because the plaintiffs had improved the property at issue. (*Ibid.*) We reversed, finding the trial court should not have so heavily relied on the potential harm rescission would cause to the defendants. (*Id.* at p. 1389.) We also found the trial court was overly concerned with the complications of unwinding the transaction and that, while the plaintiffs had made improvements to the property, those changes were commenced before the plaintiffs learned of the defendant's misrepresentations. (*Id.* at pp. 1389–1390.)

Wong is inapposite. Unlike in the instant action, delay was not an issue in *Wong* because the plaintiffs demanded rescission at the outset of the litigation. (*Wong, supra*, 237 Cal.App.4th at p. 1381.) *Wong* is also distinguishable because the Fongs made changes to the property *after* they discovered the grounds for rescission. Instead of immediately disaffirming the contract, the Fongs tried to remediate the tanks themselves and sued for damages. As discussed above, there is evidence the Fongs' remediation efforts were counterproductive. Accordingly, we cannot conclude the trial court abused its discretion in denying rescission.

D. Prevailing Party Determination

In the amended judgment, the trial court found Sheridan was the prevailing party and awarded him \$456,032.50 in fees and \$21,057.35 in costs pursuant to section 1717. The Fongs argue they were the prevailing party, and thus should have been awarded fees and costs, because they proved damages in excess of their good faith settlement with Bradley and Armstrong. In the alternative, the Fongs argue Sheridan's fees and costs should be limited to those incurred after the date of the good faith settlement. Sheridan counters that if we affirm the judgment, there can be no dispute that he is the prevailing party. Sheridan further argues that, even if the Fongs are entitled to damages in excess of the good faith settlement for their claim for negligent misrepresentation, they still would

not be the prevailing party. According to Sheridan, the amount the Fongs recover on their negligent misrepresentation claim will not affect or diminish Sheridan's victories on the contract claims.

We must reject Sheridan's last argument. It is true the Fongs may not recover attorney fees under section 1717⁶ because they did not prevail on their claim for breach of contract. However, they may be able to recover attorney fees under Code of Civil Procedure section 1021, which provides, "the measure and mode of compensation of attorneys . . . is left to the agreement, express or implied, of the parties." Here the parties' purchase agreement states: "In any action, proceeding, or arbitration between Buyer and Seller arising out of this agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller" As Sheridan himself argued below, this language is sufficiently broad to encompass both contract actions and actions in tort.⁷ (See *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342–1345 [finding similar language encompassed contract and tort claims]; *Lerner v. Ward* (1993) 13 Cal.App.4th 155, 160 [same].)

Thus, the resolution of the Fongs' contract claim is not dispositive of the parties' claims for attorney fees. Where, as here, "the attorney fee provision does encompass noncontractual claims, the prevailing party entitled to recover fees normally will be the

⁶ Section 1717 provides, in relevant part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (*Id.*, subd. (a).)

⁷ Specifically, Sheridan argued he was entitled to recover attorney fees incurred in connection with defending against the Fongs' tort and contract claims due to the broad language of the attorney fees provision. Sheridan appears to be trying to take a contrary position now. The doctrine of judicial preclusion bars him from doing so. (See *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171 [It is " 'patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite.' "].)

party whose net recovery is greater, in the sense of most accomplishing its litigation objectives, whether or not that party prevailed on a contract cause of action.” (*Maynard v. BTI Group, Inc.* (2013) 216 Cal.App.4th 984, 992.) In some instances, courts may consider settlement agreements with other defendants in assessing whether a plaintiff has accomplished his or her litigation objectives. (See *Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 452 [plaintiffs were prevailing party, even though they voluntarily dismissed their claim against one defendant prior to trial, because they reached a favorable settlement with another defendant].)

As we are vacating the trial court’s damage award due to ambiguities in its statement of decision, and since there is a possibility the Fongs may recover greater or lesser damages on remand, we cannot determine which party most accomplished its litigation objectives. Further, to the extent there is any change in the damage award, the trial court should be the one to make the prevailing party determination in the first instance. (See *Cussler v. Crusader Entertainment, LLC* (2012) 212 Cal.App.4th 356, 366 [“The trial court exercises wide discretion in determining who, if anyone, is the prevailing party for purposes of attorney fees.”].) Accordingly, we vacate the trial court’s order deeming Sheridan the prevailing party, as well as the award of attorney fees and costs, and remand for a decision consistent with this opinion.

III. DISPOSITION

The judgment is affirmed in part and reversed in part. We vacate the damage award and remand so the trial court may prepare a sufficient statement of decision on the issue. The statement of decision shall explain the factual basis for the damage award and shall also address all proper objections filed by the Fongs. We also vacate the trial court’s prevailing party determination, as well as the attorney fee and costs award, and remand for a decision consistent with this opinion. The judgment is affirmed in all other respects. The parties shall bear their own costs on appeal.

Margulies, J.

We concur:

Humes, P.J.

Dondero, J.

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